THE CITY OF TORONTO (DEFENDANT) .... APPELLANT;

1894 Oct. 2, 3.

AND

1895 *Jan. 15.

FREDERIC C. JARVIS (PLAINTIFF)......RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trespass—Damages—Easement—Equitable interest—Municipal by-law, registration of—Notice—Registry Act, R.S.O. ch. 114.

R.S.O. [1877] c. 114 s. 83, providing that no lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration but applies to all interests.

If the owner of land gives permission to the municipality to construct a drain through it the municipality, after the work has been done, has an interest in the land to which the registry laws apply whether the agreement conveys the property, creates an easement or is a mere license which has become irrevokable, and if there has been no by-law authorizing the land to be taken such interest is, under the said section, invalid as against a registered deed executed by an assignee of the owner, a purchase for value without notice. *Ross* v. *Hunter* (7 Can. S.C.R. 289) distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario (1), affirming the judgment in the High Court of Justice (Queen's Bench Division) by which the appellants were restained from maintaining or using a sewer through the lands of the respondent.

The action was brought for wrongful entry by the workmen of the city of Toronto upon the plaintiff's land for the purpose of repairing a sewer constructed by the village of Yorkville, now part of the city of Toronto.

The sewer was constructed under the following circumstances: One Severn was owner of the land in

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

(1) 21 Ont. App. R. 395.

1877, and requested the council of Yorkville to construct a sewer in the course of an open drain which ran across his land, and into which the sewage was discharged. The mutual advantage to the parties was that the corporation got a right to lay the sewer in Severn's land, and the latter was relieved from the offence occasioned by the open drain. The sewer was enlarged subsequently, and has remained there ever since. In the meantime, by a series of conveyances, the lands through which the sewer runs became vested in the respondent.

Armour Q.C. and *H. M. Mowat* for the appellant. The council of Yorkville entered with the leave of the owner, who waived the formality of a by-law; they were not compelled to take proceedings *in invitum*, nor to pass a by-law to justify this entry, but by taking and using the land for a sewer they became established in their rights as long as they chose to remain.

The interest of the municipality was a legal right not necessary to be evidenced by an "instrument," and not in fact evidenced by an "instrument" capable of registration, and was therefore not within the registry laws. *Israel* v. *Leith* (1). The case of *Ross* v. *Hunter* (2), is thus not in point.

Both the Municipal Act and the Registry Act 56 Vic. ch. 21, sec. 83, require the registration of by-laws affecting highways, but leave others untouched.

It is clear that there may be interests valid without registration. *McMaster* v. *Phipps* (3); *Harrison* v. *Armour* (4); *White* v. *Neaylon* (5).

Having with the license of the owner entered for the very purpose of expending money in lasting works, and expended it, the license originally given could not

(1) 20 O.R. 361.
(2) 7 Can. S.C.R. 289.
(3) 5 Gr. 253.
(4) 11 Gr. 303.
(5) 11 App. Cas. 171.

and cannot be revoked without notice to the licensee, and compensation for the expenditure. A parol license executed, is in a different position from a parol license for a recurring act or a series of acts. *Liggins* v. *Inge* (1); *Winter* v. *Brockwell* (2); *Plimmer* v. *Mayor of Wellington* (3). An executed license cannot be revoked at will: *Wallis* v. *Harrison* (4); *Ramsden* v. *Dyson* (5).

Moss Q.C. and *W. D. Macpherson*, for respondent. Whatever may have been the circumstances attending the construction of the sewer many years ago there is not now, and has not been for many years, anything to show that the sewer had been made use of nor in any way to indicate the presence of the sewer in or on the premises. No by-law was passed in reference to the sewer nor was any grant of the land for the purpose made. The respondent was and is a *bonâ fide* purchaser for value without notice or knowledge of the sewer referred to. He first became aware of its presence when the city's employees entered upon his land and were digging it up in order to get at and repair the sewer. He protested and upon their refusal to discontinue the present action was brought.

As there appears to have been no conveyance what the former owner gave the corporation amounted in law to a mere license to construct and maintain this sewer through his land during his life at the most, or possibly at his pleasure, or during his ownership of the property.

Incorporeal rights cannot pass by parol license without a deed. *Fentiman* v. *Smith* (6); *Hewlins* v. *Shippam* (7).

The maintenance of the present sewer cannot be justified by the license. *McMillan* v. *Hedge* (8); *Ross*

(1) 7 Bing. 682.
(2) 8 East 308.
(3) 9 App. Cas. 699.
(4) 4 M. & W. 538.
(5) L. R. 1 H. L. 129.
(6) 4 East 107.
(7) 5 B. & C. 221.
(8) 14 Can. S. C. R. 736.

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v. *Hunter* (1); Wood on Nuisance (2). Any license granted was revocable and was revoked by the annexation of Yorkville to Toronto increasing the servitude, by notices given by respondent, and by the conveyance of the lands. *Roberts* v *Rose* (3); *Wallis* v. *Harrison* (4); Goddard on Easements (5).

The right of the city of Toronto was an equitable interest within the meaning of section 83 of the Registry Act (R. S. O. c. 114) and as against a registered title is invalid. This case is governed by the case of *Ross* v. *Hunter* (1) There is no substantial difference between the provisions of the Nova Scotia Registry Act and the Ontario Registry Act, except that in section 83 there is a clause reaching the case of equitable interests.

The judgment of the court was delivered by—

THE CHIEF JUSTICE.—In 1877 John Severn was seized in fee of the *locus in quo* and in that year gave permission to the corporation of Yorkville, now represented by the appellant, to construct a drain through the land in question for the purpose of carrying off surface and other water. The municipality made the drain accordingly.

In 1879 John Severn sold the land to his son George Severn. John Severn died in February, 1880. The sale to George Severn was completed before the death of John Severn. The deed by which the property was conveyed to George Severn was not put in evidence, and it does not very clearly appear whether it was executed by John Severn himself, or by those who took under his will. The parol evidence of George Severn, given on cross-examination by the appellant, is that

(1) 7 Can. S. C. R. 289.
(2) 2 ed. pp. 380-383.
(3) L. R. 1 Ex. 82.
(4) 4 M. & W. 538.
(5) 4 ed. p. 525.

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the sale to him was carried out about the 28th of January, and that his father died on the 8th of February, 1880. By this I understand that there was a conveyance to him on the first mentioned date. It does not appear to have been disputed that this conveyance was registered; the title is spoken of in the judgment of the Court of Appeal as a registered title, and the only question as regards the registry laws seems to have been whether the interest of the municipality was an interest to which the registry laws applied, and I find it nowhere suggested that if it was there had not been such registration of the deeds as to bring the case within the operation of those laws.

George Severn, having acquired title as before mentioned, made certain mortgages. Under a power of sale contained in some of these mortgages the late Sheriff Jarvis, the father of the respondent, became a purchaser of the property for valuable consideration. Subsequently the land became vested in the respondent under a conveyance from the trustees of his father's will. These mortgages and the deed to the respondent were all duly registered.

The city authorities having entered and performed certain works in connection with the drain the respondent brought the present action to recover damages for trespasses committed in so entering; also damages for maintaining the drain.

The appellant pleaded the agreement with John Severn. The respondent replied that he and those under whom he claimed were purchasers for value and set up the registry laws.

The agreement by John Severn with the municipality of Yorkville, under which the drain was constructed, was proved beyond doubt. It was, however, also established that there was no by-law of the Yorkville council authorizing the taking of the land for the

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drain. Further, it was established by the evidence of George Severn himself, that he had direct notice of the agreement between his father and the municipality before he purchased.

Upon this state of facts Chief Justice Armour and the Court of Appeal have successively held that the respondent is entitled to recover. Their judgments both proceed upon the ground that the respondent is entitled to the benefit of the registry laws.

It is not necessary that we should define with exactitude the nature of the interest in the land taken by the municipality under the agreement with John Severn. Whether that agreement is to be taken as conferring the property in the land required and taken for the purposes of the drain, or whether it is to be considered as conferring a *quasi* easement for that purpose, or was a mere license, can make no difference. In either case it was an interest in land to which the registry laws apply.

If it was the intention to give a title to the property in the land or an easement, it matters not which, then the agreement must be deemed to have been a contract for an interest in land partly performed, one which, being for the valuable consideration involved in the expenditure on the drain, a court of equity would have decreed specific performance of. If it was a mere license it would have been revocable at first, but if not countermanded before money had been expended in the execution of the purpose for which it was conferred it would have by that expenditure become irrevocable, and therefore an interest in land. *Plimmer* v. *Mayor of Wellington* (1).

Under the original registry law equitable interests not created in writing, and therefore not susceptible of registration by memorial according to the machinery

(1) 9 App. Cas. 699.

provided by the act, were held not to be within the registry laws, and so not liable to be defeated by the registration of a subsequent grantee for value from the same grantor. A familiar example of this principle was afforded by the case of a mortgage by deposit of the title deeds. If, however, there was a writing which might have been registered it was subject to be avoided by subsequent registration, although a mere equitable title might have been conferred by it. It is not, therefore, accurate, at least under the old law, to confound equitable interests with interests not conferred by a written title, and for that reason not capable of registration.

By the Revised Statutes of 1877, c. 114, s. 83, it was, however, enacted that:

No lien, charge or interest affecting land shall be deemed valid in any court in this province, as against a registered instrument executed by the same party, his heirs or assigns.

This provision is clearly not restricted to interests derived under written instruments susceptible of registration, but it applies to all interests, including equitable mortgages, vendor's liens, parol contracts partly performed, and interests having their origin in verbal agreements such as the present, if it is to be viewed as a right to maintain the drain under an irrevocable license.

I can see no ground for confining the operation of this clause to interests in land derived under some written title.

The consequence is that the respondent's registered title must prevail against the interest of the appellant derived under the parol agreement with John Severn, unless something has occurred to disentitle him to the benefit of this eighty-third section.

It is true that George Severn had notice which would have disentitled him to set up priority obtained by re-

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gistration. This, however, was a mere personal disqualification and cannot affect those claiming under him through a registered chain of title as purchasers for value having no notice. Within this last description the respondent is clearly included.

Then it is not immaterial to notice a peculiarity in the wording of the 83rd section which does not make it essential that the registered instrument should have been executed by the grantor who conferred the unregistered interest, or even by his heirs, but gives priority even where the registered deed has been executed by the "assigns" of the party who conferred the prior unregistered interest.

The case of *Ross* v. *Hunter* (1) has, in my opinion, no application. That was a very plain case since the grantee, who had in that case omitted to register, claimed under a deed which could have been put on the registry in the ordinary manner.

The appellant also insisted on the Municipal Act applicable at the date of the agreement with John Severn in 1877. That act was the Municipal Act of 1873, cap. 48. By sec. 372 subsec. 10, it was enacted that—

The council may pass by-laws for entering upon, breaking up, taking and using any land for the purposes of a sewer.

It was argued that such a by-law did not require registration and that the case was therefore altogether outside the registry laws.

If there had been a by-law authorizing the taking of this land I should have agreed in this proposition. There was, however, no by-law and for that reason there was no expropriation under the statute. Had there been a by-law a certain publicity would have been given to the title of the municipality to the land taken up by the sewer, which is entirely lacking in the absence of such an ordinance. I cannot, therefore,

(1) 7 Can. S.C.R. 289.

agree with the appellant's contention that we are to ascribe the appellant's title to the Municipal Act, treating the by-law as having been waived, and therefore to hold the interest as one conferred by a title paramount to the registry laws. I entirely agree with what is said on this point by Mr. Justice Osler in delivering the judgment of the Court of Appeal.

It is objected to the judgment which was entered by the learned Chief Justice of the Queen's Bench that it was too large, since, as it was contended, it would entitle the respondent to recover damages not only in respect of his own time but also for damages accrued in the time of his predecessors in title. This objection is wholly unfounded. Any damages which accrued prior to the respondent's acquisition of title cannot be said to belong to him. Then the terms of the judgment in directing a reference are that it be referred to the referee—

to ascertain the loss and damages (if any) sustained by the plaintiff by reason of the illegal entry and wrongful acts of the defendants complained of in the statement of claim herein.

This clearly confines the reference to an inquiry in respect of damages accrued in the plaintiff's own time.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. M. Mowat.*

Solicitor for the respondent: *W. D. Macpherson.*